Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

J. RICHARD FURRER and MARGARET L. FURRER,
Petitioners,

vs.

DONALD F. BROWN, DOROTHY J. BROWN, LOUIS W. FAGAS, GERALDINE J. FAGAS and SHELL OIL COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The citizen suit provision of the Resource Conservation and Recovery Act ("RCRA") gives federal district courts jurisdiction to "restrain" any person who has contributed to the handling of a solid or hazardous waste which endangers the environment or to "order such person to take such other action as may be necessary." 42 U.S.C. § 6972 (a)(1)(B). A divided panel of the Eighth Circuit Court of Appeals held that this provision does not authorize a private party to pursue a claim for restitution of the costs of cleaning up a contaminated site.

The question presented for review is:

Whether the citizen suit provision of RCRA, 42 U.S.C. §6972(a)(1)(B), which authorizes district courts to "restrain" persons who have contributed to contamination or to "order such persons to take such other action as may be necessary," also authorizes a private party suit for restitution of cleanup costs.

PARTIES TO THE PROCEEDING

Petitioners, J. Richard and Margaret L. Furrer are husband and wife, residing in St. Louis County, Missouri. They are the current owners of the property located at 4701 Gravois, in the City of St. Louis, Missouri and which is the subject of the underlying action. The Petitioners were the plaintiffs in the lower court proceeding and were the appellants before the United States Court of Appeals for the Eighth Circuit.

Respondents, Donald F. Brown and Dorothy J. Brown, are husband and wife residing in St. Louis County, Missouri. They are the former owners of the property which is the subject of the underlying action, who sold the property to the Petitioners. They were defendants in the lower court proceeding and were appellees before the United States Court of Appeals for the Eighth Circuit.

Respondents, Louis W. Fagas and Geraldine J. Fagas, are husband and wife residing in St. Louis County, Missouri. They are former owners of the property which is the subject of the underlying action. They were defendants in the lower court proceeding and were appellees before the United States Court of Appeals for the Eighth Circuit.

Respondent, Shell Oil Company, is a for profit corporation operating in the State of Missouri. It is a former leaseholder of the property which is the subject of the underlying action. It was a defendant in the lower court proceeding and was an appellee before the United States Court of Appeals for the Eighth Circuit.

There are no other parties to this action.

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United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioners, J. Richard Furrer and Margaret L. Furrer respectfully petition for a writ of certiorari to review the decision and opinion of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 62 F.3d 1092 and is reprinted in the Appendix hereto at pages A1 to A21. The unpublished order of the court of appeals dated October 31, 1995, denying the Furrers' Petition for Rehearing is reprinted in the Appendix at A22. The unpublished order and memorandum

of the district court dated August 4, 1994, dismissing the action is reprinted in the Appendix at A23 to A29.

JURISDICTION

The judgment of the court of appeals was entered on August 15, 1995. A timely petition for rehearing was denied on October 30, 1995. This petition is filed within ninety days of the denial of the petition for rehearing by the court of appeals. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

Section 7002 (a)(1)(B) of the Resource Conservation and Recovery Act, 42 U.S.C. 6972(a)(1)(B), provides, in pertinent part:

> "Except as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf —
>
> (1) (A) ***
>
> (B) against any person, including the United States, and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, *who has contributed* or who is contributing *to the past or present* handling, storage, treatment, transportation, or *disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment; the district court shall have jurisdiction*, without regard to the amount in controversy or the citizenship of the parties . . . *to restrain any person* who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous

waste *referred to in paragraph (1)(B), to order such person to take such other action as may be necessary, or both,* or to order the Administrator to perform the act or duty referred to in paragraph (2), as the case may be, and to apply any appropriate civil penalties under section 6928(a) and (g) of this title. (Emphasis added.)

STATEMENT

1. This case arises out of a cleanup of gasoline-contaminated soil at a commercial property located at 4701 Gravois (hereinafter "4701 Property"), in the City of St. Louis, Missouri. A gasoline service station once operated at the location. Petitioners, J. Richard and Margaret L. Furrer (hereinafter "Furrers" or "Petitioners") are husband and wife, residing in St. Louis County, Missouri, and are the current owners of the 4701 Property. On April 1, 1982, the Furrers purchased the 4701 Property from Respondents, Donald F. and Dorothy J. Brown. Respondent, Shell Oil Company had leased the 4701 Property from the mid-1930's until the mid-1970's, and during that leasehold, underground gasoline storage tanks were apparently installed. The Furrers and the Browns however, did not discuss the tanks during the negotiations for the acquisition. Neither the Furrers nor their tenant ever used the underground gasoline tanks. There were no pumps on the property at the time of purchase. At some time prior to the Furrers' ownership of the 4701 Property, gasoline leaked from the tanks, contaminating the soil in the vicinity of 4701 Gravois.

In January, 1991, Petitioners' neighbor notified petitioners about the possibility of contamination of its property. The Furrers investigated the site, discovered contamination, and notified the Missouri Department of Natural Resources ("MoDNR") of its discovery. Pursuant to MoDNR directions, the petitioners then expended in excess of $260,000.00 in clean up costs and over $18,000.00 in related attorneys fees.

More than ninety days prior to filing the suit, petitioners notified the Administrator of the United States Environmental Protection Agency ("USEPA"), MoDNR, and respondents of their intent to file same.

2. Petitioners filed a complaint in the federal district court against the respondents pursuant to Section 7002 of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §6972, seeking restitution for costs expended in abating petroleum contamination. Respondents moved to dismiss asserting that the court did not have subject matter jurisdiction because "remediation expenses are not recoverable under the Resource Conservation and Recovery Act . . . ". On August 4, 1994, the district court entered its order granting respondents' motions.

3. On August 15, 1995, a divided panel affirmed the judgement of the District Court. App. at A1 to A—. Judge Fagg dissented.

The majority purported to rely on this Court's decision in *Cort v. Ash*, 422 U.S. 66 (1975), which sets out four factors relevant to the search for an implied cause of action." Slip op. at 4-5. Judge Fagg's dissenting opinion contended that the RCRA § 7002(a)(1)(B) authorizes an innocent landowner to file suit for restitution. Because the statute affords equitable remedies, the dissent explained, the equitable remedy of restitution "falls within the statutory allowance for district court orders" to order "such other action as may be necessary." Slip op. at 21.

REASONS FOR GRANTING THE PETITION

The issues to be decided in this case are substantially similar to those currently before the Court in *Meghrig v. KFC Western, No. 95 - 83.* There is no dispute however, in this case that appropriate notice was given to all the defendants and the regulatory authorities prior to filing the suit. Therefore, that jurisdictional question is not at issue.

A. The decision below is erroneous.

The question before the Eighth Circuit was whether the remedy of restitution is available, not whether there is an implied right of action under RCRA. While the *Cort* analysis applied by the Eighth Circuit may be the appropriate test to determine whether a statute implies a right of action, *Cort* is not the test the Court should have applied in this case. This Court has repeatedly held that the "question of what remedies are available under a statute that provides a private right of action is `analytically distinct' from the issue of whether such a right exists in the first place." *See generally, Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 112 S.Ct. 1028, 1032 (1992); *see also, Davis v. Passman,* 442 U.S. 226, 99 S.Ct. 2264 (1979), *Lieberman v. University of Chicago*, 660 F.2d 1185 (7th Cir. 1981). In other words, *Cort v. Ash* does not bear on the issue of whether a particular remedy is available under a statute. Instead, the issue plainly is what remedies are available to an aggrieved party under the statute. Therefore, the appellate court's protracted *Cort v. Ash* analysis, to divine Congress' intent regarding the availability of the remedy of restitution was misplaced.

In a series of cases dating back to the 1940's, this Court has mandated a rule of statutory construction that makes irrelevant a search for Congressional intent in this situation. *See generally, Porter v. Warner Holding Co.*, 328 U.S. 395 (1946); *United States v. Moore*, 340 U.S. 616 (1951); *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960); *Weinberger v. Romero-*

Barcelo, 456 U.S. 305 (1982); *California v. American Stores Co.*, 495 U.S. 271 (1990). This line of cases sets forth a canon for how courts should interpret the remedial scope of statutes providing the district courts with equitable jurisdiction. Under this canon, statutes granting the district courts equitable jurisdiction make all equitable remedies available to the district courts unless Congress clearly and unmistakably says otherwise. *See*, *Porter*, 328 U.S. at 398; *Moore*, 340 U.S. at 619-20; *Mitchell*, 361 U.S. at 291-92; *Weinberger*, 456 U.S. at 313; *American Stores*, 495 U.S. at 295. *See also, Hecht Co. v. Bowles*, 321 U.S. 321, 329 (holding that if Congress had intended to make such a drastic departure from the traditions of equity practice, an unequivocal statement of its purpose would have been made). This clear statement rule should have been the rule of interpretation used by the Eighth Circuit in interpreting RCRA citizen suit provision.

Porter v. Warner Holding Co., supra. sets forth the canon of statutory construction that is applicable to determining the scope of relief afforded by RCRA and other statutes that allow resort to the district courts' equitable jurisdiction. *Id.* at 398. Despite the fact that the Emergency Price Control Act did not mention the availability of any equitable relief other than an injunction, the Administrator also sought restitution from Porter Holding Company of the rents it received in violation of the Emergency Price Control Act. *Id.* at 396-97. This Court held the Emergency Price Control Act empowered the district courts to grant the restitution sought, *Id.* at 403, holding:

> Power is thereby resident in the District Court, in exercising this jurisdiction, to do equity and to mould each decree to the necessities of the particular case. *Hecht Co. v. Bowles,* 321 U.S. 321, 329. It may act so as to adjust and reconcile competing claims and so as to accord full justice to all the real parties in interest; if necessary, persons not originally connected with the litigation may be brought

> before the court so that their rights in the subject matter may be determined and enforced. In addition, the court may go beyond the matters immediately underlying its equitable jurisdiction and decide whatever other issues and give whatever other relief may be necessary under the circumstances. Only in that way can equity do complete rather than truncated justice.

Id. at 398.

After thus addressing the normal scope of the district courts' equitable jurisdiction, the Court addressed Congress' power to limit that normal scope. According to the Court, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. *Id.* A canon of statutory construction naturally followed:

> Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction.

Id.

The canon of construction developed in *Porter* has been reaffirmed and applied in numerous United States Supreme Court and Courts of Appeal decisions. *See, e.g., United States v. Moore*, 340 U.S. 616 (1951); *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960); *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982); *California v. American Stores Co.*, 495 U.S. 271 (1990); *Pierce v. Amaral*, 938 F.2d 94 (8th Cir. 1991); *Federal Trade Commission v. Security Rare Coin & Bullion Corp.*, 931 F.2d 1312 (8th Cir. 1991); *Federal Trade Commission v. Southwest Sunsites, Inc.*, 665 F.2d 711 (5th Cir. 1982).

Therefore, restitution is available as a remedy in this case. The appellate court's decision is in error because the statute grants the courts all equitable remedies and Congress has not restricted or limited the courts' equitable jurisdiction.

B. The decision below creates a conflict in the circuits.

By holding the remedy of restitution is not available, the decision below created a conflict in the circuits. The decision is contrary to *Mehgrig v. K.F.C. Western, Inc.*, No. 95 - 83, which is already before this Court. Therefore, it is appropriate for this Court to act on this petition to resolve this conflict.

C. The issues in this case are virtually identical to the issues in *Mehgrig*.

In *Mehgrig*, the Ninth Circuit ruled that RCRA § 7002 (a)(1)(B) allows a citizen to recover, under the equitable remedy of restitution, for costs expended in remediating contamination caused by prior owners of property. In this case, the petitioners sought the identical remedy. Should this Court find the remedy of restitution is available, then petitioners case should be reinstated.

Other issues alleged to be present in the *Mehgrig* case were not before the court below. Because the district court dismissed the case on the basis that RCRA does not provide the right to restitution, the issue of whether an "imminent and substantial endangerment" must exist was not decided either the district or the appellate courts.

Further, there is no issue of whether notice was properly given. Because there is no issue of notice, that jurisdictional prerequisite is not present in this case.

CONCLUSION

The Court should postpone consideration of this petition pending the Court's disposition of the *Mehgrig v. K.F.C. Western, Inc.*, No. 95 - 83, which raises the issue, also present in this case, of whether restitution is an available remedy under RCRA § 7002 (a)(1)(B). Following this Court's ruling in No. 95 - 83, the Court should dispose of this case in light of that ruling.

Respectfully submitted,

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Dated: January 12, 1996

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 94-3281

J. Richard Furrer; Margaret L. Furrer,
Appellants,

v.

Donald F. Brown; Dorothy J. Brown; Louis W. Fagas;
Geraldine J. Fagas; Shell Oil Company,
Appellees

Unknown Does, 1-100
Defendant.

State of Missouri; Bi-State Development Agency;
United States of America,
Amicus Curiae.

Appeal from the Unites States District Court
for the Eastern District of Missouri.

Submitted: April 12, 1995
Filed: August 15, 1995

Before FAGG and BOWMAN, Circuit Judges, and BENNETT,* District judge.

BOWMAN, Circuit Judge.

J. Richard Furrer and Margaret L. Furrer appeal from an order of the District Court[1] granting the separate motions to dismiss

* The HONORABLE MARK W. BENNETT, United STates District Judge for the Northern District of Iowa, sitting by designation.

[1] The Honorable Carol E. Jackson; United States District Judge for the Eastern District of Missouri.

filed by Donald F. Brown, Dorothy J. Brown, Louis W. Fagas, and Geraldine Fagas, and by Shell Oil Company, on the Furrers' claim brought under the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6987 (1988 & Supp. V 1993), to recover costs incurred in cleaning up soil contamination caused by leaking underground gasoline storage tanks located at the property known as 4701 Gravois Avenue, St. Louis, Missouri. We affirm.

I

The Furrers own the Gravois Avenue property. The Browns and Fagases were owners of the site at times before the Furrers acquired the property, and Shell Oil Company at one time was lessee of the property and operated a service station there. The Furrers became aware in 1991 that the property was contaminated by petroleum, and they "were ordered to remediate the contamination by the Missouri Department of Natural Resources" (MoDNR). Complaint at ¶ 16,*Furrer v. Brown*, No. 4:93-CV-2276 (E.D. Mo. filed Oct. 22, 1993).

The Furrers sought to recover their remediation costs from the Browns, the Fagases, and Shell Oil, appellees here, alleging federal jurisdiction pursuant to 42 U.S.C. § 6972 (1988). Besides a RCRA count, the Furrers asserted three state common law theories of recovery. The District Court granted the appellees' motions to dismiss, holding that the court did not have subject matter jurisdiction over the federal claim, and declining to exercise supplemental jurisdiction over the state law claims. The Furrers appeal. Because the dismissal for lack of subject matter jurisdiction was granted without reference to matters outside the pleadings, the appeal presents a question of law that we review *de novo*.[2] *See Christopher Lake Dev. Co. v. St. Louis County*, 35 F.3d 1269, 1273 (8th Cir. 1994).

[2] We ordered taken with the case, and now grant, appellees' motions to strike the Furrers' "Supplemental Appendix," which was filed appended to their reply brief.

II.

The statute under which the Furrers invoked federal court jurisdiction is RCRA's citizen suit provision, and reads in pertinent part as follows:

> Except as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf—
>
> . . .
>
> (B) against any person . . . including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment;
>
> . . . .
>
> . . . The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce [permits and other such requirements], to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste . . ., *to order such person to take such other action as may be necessary,* or both. . . .

42 U.S.C. § 6972(a)(1)(B) (1988) (emphasis added).

Section 6972 gives the federal courts subject matter jurisdiction to hear citizen suits where specific equitable remedies are sought: prohibitory or mandatory injunctive relief "to enforce," "to restrain," and "to order . . . other action . . . necessary." The statute does not give the district courts express authority in

citizen suits to award money judgments for costs incurred in cleaning up contaminated sites. Thus, if such a remedy is to be available, we must find either that Congress, by authorizing the district court "to order . . . such other action as may be necessary," *id.*, implicitly created such a remedy, or that the "cause of action . . . may have become a part of the federal common law through the exercise of judicial power to fashion appropriate remedies for unlawful conduct." *Northwest Airlines, Inc. v. Transport Workers Union of Am., AFL-CIO*, 451 U.S. 77, 90 (1981). Federal common law is not an issue in this case[3] and as explained in the discussion that follows we reject § 6972 as a source of federal jurisdiction for the Furrers' cause of action.

When considering the possibility that it was Congress's intent to authorize a monetary remedy for private citizens when it enacted § 6972, or, more precisely, when it amended the statute in 1984,[4] we are guided by the teachings of the Supreme Court. The "familiar test" of *Cort v. Ash*, 422 U.S. 66 (1975), which places "the burden . . .. on [the Furrers] to demonstrate that

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[3] In what was evidently intended as a preemptive strike, Shell raises in its brief to this Court (and then proceeds to argue against) the possibility that federal common law is an issue in this case. Shell contends that, because there is no statutory cause of action, federal common law is the only possible source of federal jurisdiction, but then argues there is no authority for a federal common law cause of action. In reply the Furrers, insisting that the remedy they seek is statutory, apparently agree with Shell: "There is no issue of general common law jurisdiction presented by" § 6972. Reply Brief of Appellants at 9. The Furrers have pinned their hopes on the statute, and they do not assert any theory of recovery based on federal common law, so we need not and do not discuss that source of authority.

[4] In 1984 Congress changed the language detailing the relief that the district court was empowered to grant from "to enforce such regulation or order, or to order the Administrator to perform such act or duty as the case may be, " 42 U.S.C. § 6972(a) (1982), to the present language, quoted above. Clearly the 1984 amendment expanded the available remedies; the question is the degree to which it did so.

Congress intended to make a private remedy available" such as the one the Furrers seek,[5] *Suter v. Artist M.*, 503 U.S. 347, 363 (1992), sets out four factors relevant to the search for an implied cause of action. First, we look at the statute to determine if the Furrers are in the class for whose benefit the statute was enacted, and then at the legislative history to see if it explicitly or implicitly shows an intent to create or deny the cause of action. *Cort*, 422 U.S. at 78. Third, we examine the proposed remedy in the context of the purpose of the statutory scheme, and finally we consider whether the cause of action is one traditionally a matter of state law, so that inferring a federal remedy would be inappropriate. *Id.*

A.

As discussed above, § 6972 on its face does not provide for the recovery of remediation costs by way of a citizen suit.[6] Never-

[5] The Furrers' brief demonstrates their fundamental misunderstanding of this analysis. They contend that the lack of a federal common law issue in this case, *see supra* note 3, obviates the need for a review of the factors from *Cort v. Ash*, 422 U.S. 66 (1975). Somehow they understand the *Cort* analysis—despite its emphasis on discerning what Congress intended when enacting a statute—to be a search for a cause of action in the federal common law. The *Cort* decision, however, examined a federal statute for an implied cause of action—which is what the Furrers are asking us to find here. Although federal common law theories of recovery are not relevant to this case, the *Cort* factors are.

[6] We resolve this appeal on the question of whether the cause of action for recovery of cleanup costs is available under § 6972(a)(1)(B) and pretermit other issues raised by the parties. The District Court concluded, and the appellees urge, that the Furrers did not allege the required "imminent and substantial endangerment to health or the environment" required by § 6972, since the site already has been cleaned up. We do not decide that issue. In its appellee's brief, Shell argues that petroleum leaks from underground storage tanks are not hazardous wastes within the meaning of § 6972; the United States as *amicus curiae* takes the opposite position. It is also unnecessary for us to resolve this question. Other *amici*, the State of Missouri and the Bi-State Development Agency of the Missouri-Illinois Metropolitan District, in their briefs take the Furrers' position on the issue on which we do resolve the case.

theless, Congress's failure to include express authority for the district court to award monetary relief, "although significant, is not dispositive if, among other things, the language of the statutes indicates that they were enacted for the special benefit of a class of which [the plaintiff] is a member." *Northwest Airlines,* 451 U.S. at 91-92 (footnote omitted). Clearly, the Furrers as "citizens" are among the "any persons" who are authorized to bring suit for enforcement of RCRA's permits and regulations. The "benefit" of RCRA, however, inures to all citizens of the United States, and § 6972 confers upon each of those beneficiaries the right to bring suit in the federal courts to compel enforcement of RCRA's provisions. Neither RCRA generally nor § 6972 specifically was enacted for the "special benefit" of those owners of property who pay to remediate soil contamination that has resulted from leaking underground gasoline storage tanks and for which they claim no responsibility. In fact, a persuasive argument can be made that the Furrers are in a class of persons that RCRA and § 6972 are directed *against* — the owners of a storage facility where hazardous waste has presented an imminent and substantial endangerment.*See id.* at 92 (declining to infer cause of action for employer to seek contribution from union under the Equal Pay Act and Title VII where "both statutes are expressly directed against employers"). We conclude that the language of § 6972—benefiting the citizenry of the United States generally and endowing the federal courts with subject matter jurisdiction for a suit brought by "any person"—demonstrates that it was not enacted for the "special benefit" of those in the Furrers' circumstances.

The Furrers argue that Congress, by giving the federal courts seemingly broad jurisdiction "to order [parties who have contributed to the contamination] to take such other action as may be necessary," intended a person who has incurred remediation costs to have a cause of action under § 6972 to recover those costs from the responsible parties. The Furrers characterize this recov-

ery as "equitable restitution" and ask that we find it to be a remedy within the scope of the statute.

We think the Furrers read too much into the phrase "to take such other action as may be necessary." Giving the language a natural, unstrained reading, it appears to authorize federal courts to grant mandatory injunctive relief, that is, to order the responsible party to take action: to investigate a site, to remediate a site, and so forth. We do not think that "such other action as may be necessary" contemplates the payment of money to a party who already has cleaned up a contaminated site. Similarly, jurisdiction "to enforce" or "to restrain" does not encompass the authority to award monetary relief. "[W]hen legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies."*Universities Research Ass'n, Inc. v. Coutu,* 450 U.S. 754, 773 n.24 (1981) (quoting *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974)); *accord Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979) ("Yet it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.").

As the Supreme Court repeatedly has said, we are to begin with "the statutory language, particularly . . . the provisions made therein for enforcement and relief" when determining "whether Congress intended to create a private right of action under a federal statute without saying so explicitly."*Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n,* 453 U.S. 1, 13 (1981);*see also Touche Ross & Co. v. Redington,* 442 U.S. 560, 568 (1979), and cases cited therein. The Furrers argue that the authority "to order . . . such other action" must include the full range of equitable remedies, including the restitution they claim. Assuming without deciding that it is equitable restitution that the Furrers seek (it looks to us suspiciously like money damages),

we think that even a cursory look at federal environmental legislation demonstrates that "Congress knows how to define a right to contribution" in this area of the law. *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 n.11 (1981). The examples that follow support our conclusion that Congress could have written § 6972 to include the remedy the Furrers seek, having clearly provided for it elsewhere in federal environmental law, and deliberately did not do so in this instance.

Congress demonstrated its faculty for writing a statute to include a cause of action for recovery of cleanup costs when it drafted RCRA. Within that legislation, Congress provided that the administrator of the Environmental Protection Agency (EPA) or a state could recover from the owner or operator of an underground storage tank the costs incurred "for undertaking corrective action or enforcement action with respect to the release of petroleum from" such a tank. 42 U.S.C. § 6991b(h)(6)(A) (1988). Notably, Congress authorized no such recovery for present owners and operators against previous owners and operators who are responsible for petroleum leaks from underground storage tanks.[7]

Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675 (1988 & Supp. V 1993), a later-enacted major federal environmental act, Congress provided that "[a]ny person may seek contribution from any other person who is liable or potentially liable" for response costs. 42 U.S.C. § 9613(f)(1) (1988). This cause of action for contribution is in addition to CERCLA's citizen suit statute, which, much like the RCRA citizen suit statute, provides that any person may bring a civil action in federal court and gives the district court authority to enforce CERCLA regulations and "to order such action as may be

[7] We do not intend by this discussion to imply any views on the question whether petroleum leaking from underground storage tanks is hazardous waste within the meaning of § 6972. *See supra* note 6.

necessary to correct the violation" of a CERCLA standard or requirement. *Id.* § 9659(c) (1988). Congress, knowing its CERCLA citizen suit provision did not extend the available remedies to include a cause of action for monetary recovery from other responsible parties, despite the broad "other action" language (which is also found in the RCRA citizen suit provision), and wishing to allow such a remedy in certain cases, enacted § 9613(f)(1) to provide expressly for contribution.[8]

Section 6972 is specific about the relief available under the statute. By its language, the statute authorizes injunctive relief, whether prohibitory (to stop generating hazardous waste) or mandatory (to comply with permits or regulations or to clean up hazardous waste). In other federal environmental legislation, Congress authorized suit for similar injunctive relief, but then specifically gave federal courts authority to hear claims for monetary recovery as well. "The comprehensive character of the remedial scheme expressly fashioned by Congress strongly evidences an intent not to authorize additional remedies." *Northwest Airlines*, 451 U.S. at 93-94.

B.

Although we are tempted to regard our discussion under Part IIA, *supra*, as dispositive of this case, fidelity to *Cort* requires that we next look at the legislative history of the 1984 amendment to § 6972 (clarifying the remedies available in citizen suits, *see supra* note 4) to see if we can discern any congressional intent regarding the remedy the Furrers seek. "Even settled rules of statutory construction could yield, of course, to persuasive evidence of a contrary legislative intent." *Transamerica Mort-*

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[8] Presumably the Furrers did not bring this suit for contribution under CERCLA because CERCLA's definition of "hazardous substance" excludes "petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance." 42 U.S.C. § 9601(14) (1988).

gage Advisors, 444 U.S. at 20. But as is to be expected, because the statute did not "expressly create or deny" the remedy the Furrers seek, the legislative history is "equally silent or ambiguous on the question." *Northwest Airlines*, 451 U.S. at 94 (quoting *Cannon v. University of Chicago*, 441 U.S. 677, 694 (1979)). While there is no indication in the legislative history that Congress intended to deny the recovery of cleanup costs under § 6972, by the same token there is no evidence that Congress intended to create such a remedy, and "implying a private right of action on the basis of congressional silence is a hazardous enterprise, at best." *Touche Ross*, 442 U.S. at 571.

C.

Finding no congressional intent to create a private cause of action for the recovery of cleanup costs manifest in either § 6972 or its legislative history, we might, and probably should, end the inquiry here. *See California v. Sierra Club*, 451 U.S. 287, 298 (1981) (noting that the last two *Cort* factors "are only of relevance if the first two factors give indication of congressional intent to create the remedy"). But out of an abundance of caution we nevertheless have considered the third factor, the underlying purpose of the statute and the structure of the federal environmental statutory scheme, and we conclude that the remedy sought is not "necessary to make effective the congressional purpose" of § 6972. *Cort*, 422 U.S. at 84 (quoting *J. I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964)).

RCRA itself states that the objectives of the Act "are to promote the protection of health and the environment and to conserve valuable material and energy resources," and then sets forth eleven routes to that goal, none of which relate specifically to the citizen suit provision. 42 U.S.C. § 6902(a) (1988). The "national policy" statement accompanying the Act addresses only the reduction or elimination of "the generation of hazardous waste . . . as expeditiously as possible," and the appropriate treatment, storage, or disposal of "[w]aste that is nevertheless

generated," but does not speak specifically to already contaminated property or its remediation. *Id.* § 6902(b). The citizen suit provision itself "permits individuals to commence an action in district court to *enforce waste disposal regulations* promulgated under" RCRA. *Hallstrom v. Tillamook County*, 493 U.S. 20, 22 (1989) (emphasis added). The overriding purpose of RCRA is clear: to prevent generation of hazardous waste in the first place, and to dispose of and treat properly that which is produced. In other words, RCRA's goal is to prevent the creation of hazardous waste sites, rather than to promote the cleanup of existing sites.

Looking at § 6972, we see that, notwithstanding the inclusion of this citizen suit provision in RCRA, the statute has provisions whose obvious goal it is to forestall citizen suits so that they become available only as a last resort. The § 6972 plaintiff must give sixty days notice to the EPA, the state, and the alleged violator before bringing suit. 42 U.S.C. § 6972(b)(1)(A) (1988). The purpose of the notice requirement is to "allow[] Government agencies to take responsibility for enforcing environmental regulations, thus obviating the need for citizen suits," and to give the reputed violator the opportunity to correct his behavior so that it conforms with RCRA.*Hallstrom* 493 U.S. at 29. Citizen suits are further discouraged by the very statute that authorizes them, because a person may not commence a § 6972 suit if the EPA or the state has initiated and is "diligently prosecuting" an enforcement suit (although a citizen may intervene in such a suit in federal court). 42 U.S.C. § 6972(b)(1)(B) (1988). It is apparent that, while Congress intended to allow citizen suits in order to foster compliance with RCRA's regulations, it wrote § 6972 to discourage citizen suits when compliance is at hand.

The legislative history of the 1984 amendment to § 6972 supports our conclusion that Congress intended the section to further the enforcement of RCRA regulations, that is, the regulation of hazardous waste, and did not intend to give citizens a cause of action for recovery of costs incurred for the cleanup of

hazardous waste sites when regulation has failed. "[T]he legislative history indicates an intent to strike a balance between encouraging citizen enforcement of environmental regulations and avoiding burdening the federal courts with excessive numbers of citizen suits." *Hallstrom*, 493 U.S. at 29.

According to the House Report, the 1984 amendment "confers on citizens a *limited right* under [§ 6972] to sue *to abate* an imminent and substantial endangerment." H.R. Rep. No. 198, 98th Cong., 2d Sess., pt. 1, at 53 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5576, 5612 (emphasis added). This language makes it clear that we should not be inclined to add to the list of remedies found in the statute.[9] A cause of action "to abate" is a suit for an injunction—whether prohibitory to stop the generation of hazardous waste or mandatory to compel compliance with RCRA regulations. There is no indication that § 6972 as amended was intended to expand citizens' remedies to include the recovery of cleanup costs.

The comprehensive structure of federal environmental legislation in general, as discussed *supra*, at 7-8, also cautions against inferring a monetary remedy under § 6972. Numerous statutes that specifically authorize actions with such a remedy are already in place, further evidencing that the purpose of § 6972 was something else altogether.

The Furrers contend that allowing a cause of action to recover cleanup costs from those who have contributed or are contributing to contamination effectuates the purpose of RCRA and is an appropriate remedy within the rubric of § 6972's "other action . . . necessary." As the argument goes, citizens like the Furrers will be encouraged to abate contamination voluntarily, because

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[9] The minority views on the bill reflect a similar understanding of a RCRA citizen suit: that it is "intended to be an emergency type action to abate imminent hazards." H.R. Rep. No. 198, 98th Cong., 2d Sess., pt. 1, at 119 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5576, 5635.

they then can sue under § 6972 to recover remediation costs for which they are not equitably responsible.

We cannot deny that the Furrers' argument has a considerable surface appeal. We are mindful, however, that abatement of a hazardous waste spill can be ordered in diverse circumstances by a variety of federal and state authorities, and that liability for the remediation of contaminated property attaches, without regard to fault, to the then owner of the property. Thus, regardless of their ability to bring suit to recover costs expended in remediating a contaminated site, owners will clean up the waste—or they will be sued and forced to do so—and the goal of the abatement will be served. The Furrers have alleged that they cleaned up the Gravois Avenue property because they were ordered to do so by the MoDNR, not because they knew they could recover their costs from the appellees. In the circumstances, we think it disingenuous of he Furrers to suggest that the remediation of the Gravois Avenue site might have been motivated by a federal remedy to recover cleanup costs, especially given the doubtful availability of that remedy. And as a general proposition we believe that it is the threat of criminal or civil sanctions that hasten a cleanup such as the one undertaken by the Furrers, not a belief that, under RCRA, remediation costs can be recovered from previous owners or users of the property.

In conclusion, we cannot say that the purposes of environmental law and of § 6972 would be served by providing for a monetary remedy in a citizen suit under § 6972. Thus the third *Cort* factor provides no assistance to the Furrers.

D.

We come now to the fourth *Cort* factor, which focuses on the relationship between federal law and state law and asks whether "the cause of action [is] one traditionally relegated to state law, in an area basically the concern of the States." *Cort*, 422 U.S. at 78. If so, it would be inappropriate to find an implied federal

cause of action. Having concluded, based on our analysis of the first three *Cort* factors, "ones traditionally relied upon in determining legislative intent," *Touche Ross*, 442 U.S. at 576, that Congress did not intend to incorporate within § 6972 an implied remedy for the recovery of cleanup costs, the fourth factor in the inquiry would seem to hold little, if any, significance. *See id.* at 575; *California v. Sierra Club*, 451 U.S. at 298 (stating that the last two *Cort* factor are irrelevant unless "the first two factors give indication of congressional intent to create the remedy"). Even so, we have considered this final *Cort* factor and have concluded, notwithstanding that the general subject matter of § 6972 may not be an area primarily of state concern, that this factor, like the others, affords no basis for finding in § 6972 an implied cause of action for the recovery of cleanup costs.

Section 6972 has a savings clause, which preserves a person's rights "under any statute or common law . . . to seek any other relief." 42 U.S.C. § 6972(f) (1988). The legislative history of the 1984 amendment to § 6972 reflects a debate in the House about the extent to which federal courts should assume jurisdiction over preserved supplemental state law claims. The majority committee report evidences an expectation that, the savings clause notwithstanding, courts will "exercise their discretion concerning pendent jurisdiction in a way that will not frustrate or delay the primary goal of this provision, namely the prompt abatement of imminent and substantial endangerments." H.R. Rep. No. 198, 98th Cong., 2d Sess., pt. 1, at 53 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5576, 5612. The committee minority wished to strip federal courts of jurisdiction to hear any supplemental state law claims brought with RCRA citizen suits. The minority was concerned that allowing adjudication of state claims with § 6972 suits would unduly burden the federal courts and slow down the primary goal of the statute: the abatement of imminent hazards. "Instead of ending the imminent hazard, federal judges will be trying to decide cumbersome questions of state law nuisance, trespass, and personal and property damage

compensation." *Id.* at 119, *reprinted in* 1984 U.S.C.C.A.N. at 5635. Clearly all committee members had concerns (although to different degrees) about federal courts losing focus and concentrating on peripheral issues related to state claims—such as apportioning fault so as to award contribution—instead of acting quickly to abate imminent hazards. Given the specific reservation of state remedies in § 6972(f), and given congressional concern that citizen suits not become bogged down in the quest for private state law remedies (such as the recovery of cleanup costs), we think that this is at best a neutral factor and does nothing to advance the case for finding an implied federal cause of action for the recovery of cleanup costs.

E.

In sum, none of the four *Cort* factors tips the scales in favor of implying in § 6972 a cause of action to recover cleanup costs. In any event, as we intimated above, the *Cort* analysis no longer involves a balancing of the four factors; they now serve only as "guides to discerning" congressional intent.[10] *Thompson v. Thompson*, 484 U.S. 174, 179 (1988). "The central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action." *Touche Ross*, 442 U.S. at 575. In none of the factors do we find a basis for imputing to Congress the intent to create in § 6972 an implied private cause of action for the recovery of cleanup costs.

III.

The Furrers commend to us the Ninth Circuit's opinion in *KFC Western, Inc. v. Meghrig*, 49 F.3d 518 (9th Cir. 1995),

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[10] Justices O'Connor and Scalia would require "an actual congressional intent to create a private right of action," and believe the *Cort* analysis has been "effectively overruled" by subsequent Supreme Court opinions. *Thompson v. Thompson*, 484 U.S. 174, 188 (1988) (Scalia, J., concurring); *see also Roberts v. Wamser*, 883 F.2d 617, 623 n.17 (8th Cir. 1989) (questioning "the continued validity of the *Cort* analysis for determining the existence of private rights of action").

petition for cert. filed (July 13, 1995) (No. 95-83), and urge that we follow the reasoning of the majority in that case. In a split decision, the court held that § 6972(a)(1)(B) gives the district court jurisdiction over private actions for the recovery of clean-up costs. We think, however, that the court began with a questionable proposition and then mistakenly reached its result in reliance on cases from this Circuit that, when carefully analyzed, do not support the *KFC Western* decision.

In § 6973, entitled "Imminent hazard," Congress has given the EPA administrator this authority:

> Notwithstanding any other provision of this chapter, upon receipt of evidence that the past or present handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment, the Administrator may bring suit on behalf of the United States in the appropriate district court against any person . . . who has contributed or who is contributing to such handling, storage, treatment, transportation or disposal to restrain such person from such handling, storage, treatment, transportation or disposal, to order such person to take such other action as may be necessary, or both.

42 U.S.C. § 6973(a) (1988). The *KFC Western* court summarily states that, "[b]ecause Congress intended that citizen suits be governed by the same standards of liability as governmental actions, and because it worded the provisions almost identically, we choose to interpret similarly the relief available under the two provisions." *KFC Western*, 49 F.3d at 521-22 (footnote omitted). The only support cited for the first part of that proposition is legislative history that, according to the court, "suggests" that suits under the citizen suit provision and the similar EPA suit provision were intended to parallel one another. According to the court, "[n]othing indicates that Congress intended citizen suits to serve a purpose different from that served by governmental

actions." *Id.* at 521 n.3. But it is a *non sequitur* that the remedies available to the respective plaintiffs must be the same.

The language in the legislative history upon which the Ninth Circuit (and the Furrers) rely is this: "[The 1984 amendment to § 6972] confers on citizens a limited right under [§ 6972] to sue to abate an imminent and substantial endangerment pursuant to the standards of liability established under [§ 6973]." H.R. Rep. No. 198, 98th Cong., 2d Sess., pt. 1, at 53 (1984), *reprinted in*, 1984 U.S.C.C.A.N. 5576, 5612. First of all, this language indicates that the right to sue is conferred on private citizens pursuant to the standards of *liability* developed under § 6973; it does not say private citizens are entitled to the same *remedies* that are available to the EPA under § 6973. In addition, it is the right to sue "to abate"—a "limited right" at that—that is conferred pursuant to the standards of liability under § 6972, not any right to recover abatement costs. Even the *KFC Western* majority recognizes that "the legislative history cuts both ways," *KFC Western*, 49 F.3d at 521 n.3, but the court nevertheless relies on it to read §§ 6972 and 6973 as granting authority to award identical remedies to private plaintiffs and to governmental plaintiffs. From an arguably faulty premise, then, the court goes on to misconstrue two Eighth Circuit opinions involving governmental plaintiffs and to conclude that § 6972 authorizes the recovery of cleanup costs by private plaintiffs. In the two cases from this Circuit upon which the *KFC Western* court relies, the issue of whether cleanup costs may be recovered in a governmental action under § 6973(a) was never before this Court.

In *United States v. Northeastern Pharmaceutical & Chemical Co. (NEPACCO)*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987), the United States in a cross-appeal challenged the district court's refusal to award "response costs" under § 6973(a), a decision made because the court believed the statute required a showing of negligence and the government had made none. The Eighth Circuit reversed that holding on the negligence

issue, but never made a finding that the recovery of response costs was available to the government under § 6973 in the first instance, apparently because the jurisdiction of the district court to award the recovery of such costs under RCRA was unchallenged. The issue may have been overlooked because many of the costs sought by the government were explicitly recoverable as response costs under CERCLA.

In *United States v. Aceto Agricultural Chemicals Corp.*, 872 F.2d 1373 (8th Cir. 1989), the RCRA claim for "response costs" had been dismissed by the district court on the basis of its conclusions concerning the "imminent and substantial endangerment" and the "contributed to" language found in § 6973(a). The Eighth Circuit reversed and remanded for further proceedings, but again never addressed whether the remedy sought was authorized by § 6973.

Thus in both *NEPACCO* and *Aceto*, because the defendants did not raise the issue of subject matter jurisdiction and neither the district courts nor this Court addressed it *sua sponte*, the decisions reflect no consideration of the jurisdictional issue; instead, they simply assume subject matter jurisdiction *sub silentio* and deal with the merits of the EPA's claims to recover cleanup costs. Now that the jurisdictional question is squarely before us, the opinions in *NEPACCO*and *Aceto* are not *stare decisis* on the issue, because the panels in those cases simply assumed, without deciding, that the federal courts are empowered by § 6973 to award the EPA the recovery of cleanup costs. Moreover, except for the *KFC Western* case, the Furrers have identified for us, and we have found, no cases specifically addressing the availability of a monetary remedy in § 6972 citizen suits since the 1984 amendment or before 1984 for that matter) that have concluded that § 6972 provides such a remedy. There are several cases from federal district courts, however, that have decided as we do today. *See, e.g., Portsmouth Redev. & Housing Auth. v. BMI Apartments Assocs.* , 847 F. Supp. 380,

385 (E.D. Va. 1994); *Triffler v. Hopf*, No. 92 C 7193, 1994 WL 643237, at *5 (N.D. Ill. Nov. 4, 1994); *Gache v. Town of Harrison, N.Y.*, 813 F. Supp. 1037, 1045 (S.D.N.Y. 1993); *Fallowfield Dev. Corp. v. Strunk*, Nos. CIV. A. 89-8644, CIV. A. 90-4431, 1993 WL 157723, at *14-15 (E.D. Pa. May 11, 1993); *Commerce Holding Co. v. Buckstone*, 749 F. Supp. 441, 445 (E.D.N.Y. 1990). Having done our own independent analysis of the issue, we must respectfully disagree with the holding of our sister circuit in *KFC Western*.

IV.

Our holding leaves the Furrers without a remedy under § 6972 for the recovery of the costs they have incurred in cleaning up their property. We are not unsympathetic to the Furrers' case, but we cannot justify inferring a remedy under § 6972 for the recovery of cleanup costs when we are unable to find any indication that Congress intended to create such a remedy. "The ultimate question is one of congressional intent, not one of whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law." *Touche Ross* 442 U.S. at 578. An important part of the statutory scheme in this case is the preservation of remedies under state law. Counsel represented to the Court at oral argument that the Furrers are pursuing their state law remedies in state court. Nothing in this opinion is intended to hinder them in that pursuit.

For the reasons stated, the judgment of the District Court is affirmed.

BENNETT, District Judge, concurring.

Judicial fathoming of Congressional intent is often a treacherous voyage. That is not so here. I wholeheartedly agree with Judge Bowman's well-reasoned and carefully crafted opinion holding that Congress did not intend to create in § 6972 an implied private right of action for the recovery of cleanup costs. I join this opinion unreservedly for I find Judge Bowman's

application of the factors identified in *Cort v. Ash*, 422 U.S. 66 (1975), and his divination of Congressional intent, to be unassailable.

The Ninth Circuit Court of Appeals in *KFC Western, Inc. v. Meghrig*, 49 F.3d 518, 523 (9th Cir. 1995), and Judge Fagg, in dissent here, may well be right that it may be "unfair and poor public policy to interpret § 6972(a)(1)(B) as barring restitution actions." However, I would add that under our tripartite system of government, it is for Congress, not the federal courts, to make such policy choices. *See, e.g., Hudson Distribs., Inc. v. Eli Lilly & Co.*, 377 U.S. 386, 395, 84 S. Ct. 1273, 1279-80, 12 L. Ed. 2d 394 (1964); *Baltimore & Ohio Ry. Co. v. Jackson*, 353 U.S. 325, 331, 77 S. Ct. 842, 846, 1 L. Ed. 2d 862 (1957); *Black Hills Institute Of Geological Research v. South Dakota School of Mines & Technology*, 12 F.3d 737, 744 (8th Cir. 1993). The role of the federal courts, "of course, is as interpreters of the words chosen by Congress, not as policymakers or enlargers of congressional intent." *United States v. Gibbons*, 25 F.3d 28, 33 (lst Cir. 1994).

FAGG, Circuit Judge, dissenting.

For the reasons stated by the Ninth Circuit in *KFC Western, Inc. v. Meghrig*, 49 F.3d 518 (9th Cir. 1995), I believe the Resource Conservation and Recovery Act's citizen suit provision, 42 U.S.C. § 6972(a)(1)(B), authorizes an innocent private purchaser of property contaminated with solid or hazardous waste to bring an equitable action for reimbursement of clean-up costs. Because the statute permits citizens to obtain injunctive or other equitable relief, "a restitutionary remedy . . . falls within the statutory allowance for district court orders that [polluters] take 'such other action as may be necessary.'" *KFC Western*, 49 F.3d at 521 (quoting 42 U.S.C. § 6972(a)(1)(B)). Given this jurisdictional framework, I readily agree with the Ninth Circuit that it "would be unfair and poor public policy to interpret §

6972(a)(1)(B) as barring restitution actions." *Id.* at 523. Thus, I would reverse the district court.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 94-3281EMSL

J. Richard Furrer, et al.,
Appellants,

vs.

Donald F. Brown, et al.,
Appellees.

Order Denying Petition for Rehearing and
Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. Judge Fagg and Judge Beam would grant the suggestion for rehearing en banc.

The petition for rehearing by the panel is also denied.

October 30, 1995

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Case No. 4:93-CV-2276 (CEJ)

J. RICHARD FURRER, et al.,
Plaintiffs,

vs.

DONALD F. BROWN, et al.,
Defendants.

ORDER

[Filed: Aug. 4, 1994]

In accordance with the Memorandum filed herewith this date,,

IT IS HEREBY ORDERED that defendants' motions to dismiss are granted.

IT IS FURTHER ORDERED that this action is dismissed for lack of subject matter jurisdiction

/s/ Carol E. Jackson
CAROL E. JACKSON
UNITED STATES
DISTRICT JUDGE

Dated this 4th day of August, 1994.

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Case No. 4:93-CV-2276 (CEJ)

J. RICHARD FURRER, et al.,
Plaintiffs,

vs.

DONALD F. BROWN, et al.,
Defendants.

MEMORANDUM

[Filed: Aug. 4, 1994]

This matter is before the Court on the defendants' motions to dismiss. *See* Fed. R. Civ. P. 12(b)(1) and (6). Plaintiffs oppose these motions.

Plaintiffs bring this action to recover expenses they incurred in remediating soil contamination caused by leaking underground petroleum storage tanks. Plaintiffs are the owners of property located at 4701 Gravois in the City of St. Louis, Missouri. Defendants Donald F. Brown, Dorothy J. Brown, Louis F. Fagas, and Geraldine Fagas are all previous owners of the property. Defendant Shell Oil Company formerly leased the property and operated an automobile service station there.

In Count I plaintiffs assert a claim pursuant to 42 U.S.C. § 6972(a)(1)(B) against all defendants for violation of the Resource Conservation and Recovery Act ("RCRA"), as amended by the Hazardous and Solid Waste Amendments of 1984, Pub.L. 98-616, Title IV, § 401(a)(3), Nov. 8, 1984. Plaintiffs' assert a claim for "equitable indemnity" against all defendants in Count III, for quantum meruit against all defendants in Count III, and

for unjust enrichment against defendants Donald F. Brown and Dorothy J. Brown in Count IV. Jurisdiction of Count I is premised on 28 U.S.C. § 1331; the plaintiffs invoke the Court's supplemental jurisdiction pursuant to 28 U.S.C. § 1367 over the remaining counts.

Defendants move to dismiss Count I of plaintiffs' complaint arguing that the citizen suit provision of RCRA, 42 U.S.C. § 6972(a)(1)(B), does not authorize a private cause of action for damages. This statute provides, in pertinent part:

> Except as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf — . . .
>
> (B) against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment. . .

The RCRA citizen suit provision is designed to provide a cause of action to individuals acting as "private attorneys general" as opposed to individuals seeking to secure private relief. *Environmental Defense Fund, Inc. v. Lamphier,* 714 F.2d 331, 337 (4th Cir. 1983); *Commerce Holding Co. v. Buckstone*, 749 F.Supp. 441, 445 (E.D.N.Y. 1990). This intent is evidenced by the limited jurisdiction of a court with respect to the remedies available in a citizen suit action. 42 U.S.C. § 6972(a) provides:

> The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties,

> to enforce the permit, standard, regulation, condition, requirement, prohibition, or order, referred to in paragraph (1)(A), *to restrain* any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in paragraph (1)(B), to order such person to take such other action as may be necessary, or both, or to order the Administrator to perform the act or duty referred to in paragraph (2), as the case may be, and to apply any appropriate civil penalties under section 6928(a) and (g) of this title. (emphasis added).

Plaintiffs in this case have cleaned up the petroleum contamination on the property and now seek to recover the cost incurred in doing so. Recognizing that the plain language of the citizen suit provision of RCRA does not provide for a cause of action for damages, plaintiffs attempt to characterize the relief they seek as equitable in nature. Despite the terminology plaintiffs use to describe their remedy in this case, they are essentially seeking monetary damages. *See Buckstone*, 749 F.Supp. at 445; *Portsmouth Redevelopment and Housing Authority v. BMI Apartments Associates*, 1994 WL 106698, *2 (E.D. Va. 1994).

The plain language of a statute is the first place to look when determining its meaning. *Russello v. United States*, 464 U.S. 16, 20 (1983). It is undisputed that the RCRA citizen suit provision does not expressly authorize a private right of action for damages. *See Portsmouth*, 1994 WL at * 3. Where a statute expressly provides for particular remedies, the court should be wary of reading other remedies into the statute. *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1, 14-15 (1981). Because the citizen suit provision expressly permits only injunctive relief, the Court is reluctant to imply a cause of action for damages.

Although this is a case of first impression in this Court, most of the courts who have considered the issue have determined that

RCRA does not authorize a plaintiff to recover past remediation costs. *Buckstone*, 749 F.Supp. at 445-46; *Portsmouth*, 1994 WL 106698 at * 3; *Gache v. Harrison*, 813 F.Supp. 1037, 1045 (S.D.N.Y. 1993); *Kaufman and Broad-South Bay v. Unisys Corporation*, 822 F.Supp. 1468, 1477 (N.D. Cal. 1993); *Dominick's Finer Foods, Inc. v. Amoco Oil Company*, 1993 WL 524808, at n.5 (N.D. Ill. 1993); *Walls v. Waste Resource Corp.*, 761 F.2d 311, 316 (6th Cir. 1985); David C. Shilton, *Groundwater Pollution Litigation in the Federal Courts: An Evaluation of Three New Private Remedies*, 3 J. Envtl. L. & Litig. 91, n. 162 (1988); Kevin R. Duncan and B. Todd Bailey, *Innocence Amid "Lust": The Innocent Buyer and Leaking Underground Storage Tanks Containing Petroleum*, 7 B.Y.U. J. Pub. L. 245 (1993) ("In fact, no court has awarded damages under the citizen's suit provisions to an innocent purchaser of real estate containing a leaking UST [underground storage tank].")

Plaintiffs rely on *United States v. Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987) (*NEPACCO*) in support of their position that RCRA allows a private right of action to recover the costs of remediating contaminated soil. Plaintiffs assert that the court in NEPACCO ruled that the United States, as a plaintiff in a RCRA proceeding under 42 U.S.C. § 6973(a), could recover its remediation costs from the entities responsible for contaminating its property. Plaintiffs argue that because 42 U.S.C. § 6973(a) limits the remedies in the same way as 42 U.S.C. §6972(a), they should be able to recover their remediation costs.

The court in *NEPACCO* did not rule that the United States could recover restitution under RCRA for remediating contaminated soil. Instead, the court held that the government could recover its pre enactment response costs under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA). *NEPACCO*, 810 F.2d at 749. The court's decision concerning RCRA was limited to the holding that

"RCRA imposes strict liability upon past off-site generators and transporters of hazardous substances." *Id.* Contrary to plaintiffs' assertions, the court in *NEPACCO* did not find that a litigant could recover damages under RCRA.

Moreover, RCRA authorizes the Environmental Protection Agency or a state to recover cleanup costs incurred in remediating contamination caused by petroleum leaking from an underground storage tank. 42 U.S.C. § 6991b(h)(6)(A). In contrast, RCRA does not mention whether a private litigant may recover these costs. *Expressio unius est esclusio alterius.* Therefore, it is likely that Congress intended to allow government entities to recover their past remediation costs, while affording private litigants only injunctive relief. *See Russello*, 464 U.S. at 22, *quoting United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972) ("[W]here Congress includes particular language in one part of the statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.")

Finally, in order to prevail on their claim under RCRA, the plaintiffs must plead and prove that the leaking petroleum presents "an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a)(1)(B). Plaintiffs make no such allegation here. Further, as the plaintiffs have completely cured the contamination at issue in this case it will be impossible for them to prove that the petroleum contamination currently presents an imminent and substantial endangerment to the health or the environment.

Because the Court does not have jurisdiction over a suit under 42 U.S.C. § 6972(a)(1)(B) for "restitution" to recover costs associated with remediating petroleum contamination from leaking underground storage tanks, defendants' motion to dismiss will be granted as to Count I. Further, the Court will decline to exercise supplemental jurisdiction over the remaining counts and these counts also will be dismissed. 28 U.S.C. § 1367(c)(3).

/s/ Carol E. Jackson
CAROL E. JACKSON
UNITED STATES
DISTRICT JUDGE

Dated this 4th day of August, 1994.

Supreme Court, U.S.
FILED
MAR 26 1996
CLERK

No. 95-1378

In The

Supreme Court of the United States

October Term, 1995

J. RICHARD FURRER and MARGARET L. FURRER,

Petitioners,

vs.

DONALD F. BROWN, DOROTHY J. BROWN, LOUIS W. FAGAS, GERALDINE J. FAGAS and SHELL OIL COMPANY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Question Presented as outlined by Petitioners is whether the provisions of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6972(a)(1)(B), authorize a private party to bring suit for recovery of cleanup costs, whether such costs be called "restitution" or "damages." The question is identical to that unanimously decided by this Court on March 19, 1996, in ***Meghrig v. KFC Western, Inc.***, No. 95-83, ___ U.S. ___, 64 U.S.L.W. 4135.

CLARIFICATION OF PRELIMINARY MATTERS

Pursuant to Rule 15 of the Rules of the Supreme Court of the United States[1], Respondent Donald F. Brown and Dorothy J. Brown file this Brief In Opposition to Petition For Certiorari filed by Petitioners J. Richard Furrer and Margaret L. Furrer.[2] Respondents Brown believe that the caption as filed in the "corrected Petition For A Writ of Certiorari," filed on February 28, 1996 according to the Proof of Service, as well as the caption to this Reply, correctly lists all of the parties to the proceeding as allowed in Rule 14(b).[3] Petitioner has correctly outlined the opinions below, the jurisdiction of this Court to hear the Petition, and the statutory provisions involved.

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[1] Hereafter, the Rules of this Court will simply be referred to as "rule" followed by the Rule number.

[2] The Petition For A Writ of Certiorari filed by the Furrers in this Court shall be referred to for simplicity as "Pet." followed by the relevant page number of the Petition.

[3] There is some question as to whether the Petition For A Writ of Certiorari was timely filed. The original Petition was apparently received by the Court on January 16, 1996, although no docketing fee accompanied the Petition as required by Rules 12.1 and 38, and the Petition did not technically comply with Rule 14. A "corrected Petition" was served by mail on Respondents Brown on February 28, 1996, and the case was docketed by the Court on or about that latter date. The ninetieth day following the denial of the Petition For Rehearing to the Eighth Circuit Court of Appeals expired on January 28, 1996. The question is, however, moot in light of the substantive reasons for denying certiorari as outlined in this Brief.

REASONS FOR DENYING THE PETITION FOR WRIT

The Petitioners have not invoked any of the reasons for this Court exercising its discretion to grant certiorari as required by Rule 10. If any such reasons existed on the date of filing, those reasons have been rendered moot by this Court's unanimous opinion in ***Meghrig v. KFC Western, Inc.***, No. 95-83, ___ U.S. ___, 64 U.S.L.W. 4135, decided March 19, 1996.

Petitioners have also not accurately nor concisely stated the case as it appeared in the Eighth Circuit and the District Court for the Eastern District of Missouri below. The case was disposed of on the pleadings, so the parties are bound by the pleadings of Petitioner for the purpose of review. However, certain of Petitioners statements go beyond what was pled by them below.

Petitioners assert at Pet. 3 that:

> The Furrers and the Browns however, did not discuss the tanks during the negotiations for the acquisition. Neither the Furrers nor their tenant ever used the underground gasoline tanks.

The first of these propositions was not pled by Petitioners. Since it is not germane to the decisions of the lower courts, it is inapposite to the issues presented here.[4]

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[4] While Respondents Brown disagree with these facts, and point them out as requested in Rule 15(a), the facts are not ultimately dispositive of the denial of the Petition, and as a result Respondents do not burden the Court by attaching the original Complaint as an appendix.

The second proposition, while pled, is one about which the parties are in dispute, and one about which Respondents Brown believe Petitioners have contradicted themselves in subsequent pleadings and discovery. However, since again it is not the basis for the rulings of the courts below, nor crucial to the Petitioners' case, it is inapposite to the issues presented. While Respondents Brown disagree with the other facts as outlined, they were pled and were considered in the decisions below.

At Pet. 8 the Petitioners assert:

> Because the district court dismissed the case on the basis that RCRA does not provide the right to restitution, the issue of whether an "imminent and substantial endangerment" must exist was not decided either [sic] the district or appellate courts.

This statement is in direct contrast to the ruling of the District Court as set out at A-28 of the Appendix filed by Petitioner:

> Finally, in order to prevail on their claim under RCRA, the plaintiffs must plead and prove that the leaking petroleum presents "an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a)(1)(B). **Plaintiffs make no such allegation here.** Further, as the plaintiffs have completely cured the contamination at issue in this case **it will be impossible for them to prove** the petroleum contamination currently presents an imminent and substantial endangerment to the health or the environment.

(emphasis added). While the Eighth Circuit acknowledged this conclusion of the District Court, it did not

decide the particular issue. See, Footnote 6, A-5, Opinion of the Eighth Circuit.

Finally, Petitioners try to avoid the issue by suggesting that there is some substantive difference between whether they are asking this Court to decide whether there is an implied cause of action under RCRA, or whether the remedy of restitution is available to a private citizen under RCRA. The answer to both questions has been put to rest by this Court on March 19, 1996, in the Court's decision in ***Meghrig v. KFC Western, Inc.***, No. 95-83, ___ U.S. ___, 64 U.S.L.W. 4135. In that case, this Court addressed the identical issues and unanimously held:

> It is apparent from the two remedies described in § 6972(a) that RCRA's citizen suit provision is not directed at providing compensation for past cleanup efforts. Under a plain reading of this remedial scheme, a private citizen suing under § 6972(a)(1)(B) could seek a mandatory injunction, . . . or a prohibitory injunction, ... Neither remedy, however, is susceptible of the interpretation adopted by the Ninth Circuit, as neither contemplates the award of past cleanup costs, whether these are denominated "damages" or "equitable restitution."

Meghrig, ___ U.S. at ___, 64 U.S.L.W. at 4136-4137. It seems inescapable that ***Meghrig*** disposes of the issue presented in this case with certitude and finality. The Petitioners seek to recover for costs of cleanup which they admit they have already incurred at the request of the Missouri Department of Natural Resources. See, Pet. 3, and A-2 Opinion of the Eighth Circuit. The case is

identical to ***Meghrig*** in spite of Petitioners' attempts to distinguish the two. This Court's unanimous opinion in ***Meghrig*** does not admit exception or interpretation; it could not have been more definitive. The Petition For A Writ of Certiorari here should be denied.

Respectfully submitted,

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(3)

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No. 95-1378

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

J. RICHARD FURRER and MARGARET L. FURRER,
Petitioners,

v.

DONALD F. BROWN, DOROTHY J. BROWN, LOUIS W. FAGAS, GERALDINE J. FAGAS, and SHELL OIL COMPANY,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT SHELL OIL COMPANY'S MEMORANDUM IN OPPOSITION

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5pp

QUESTIONS PRESENTED

1. Whether § 7002(a) of the Resource Conservation and Recovery Act, 42 U.S.C. § 6972(a), grants district courts subject matter jurisdiction to adjudicate a cause of action by a private citizen for a monetary judgment for the recovery of past cleanup costs for remediating contamination.

2. Whether a plaintiff must allege that an extant waste may present an imminent and substantial endangerment to health or the environment to state a claim under § 7002(a)(1)(B) of the citizen suit provision of the Resource Conservation and Recovery Act, 42 U.S.C. § 6972(a)(1)(B).

RULE 29.6 STATEMENT

Consistent with Rule 29.6 of the Rules of the Supreme Court of the United States, Shell Oil Company states that its parent corporation is Shell Petroleum Inc., whose shares are directly or indirectly owned 60 percent by Royal Dutch Petroleum Company, The Hague, The Netherlands, and 40 percent by The "Shell" Transport and Trading Company, public limited company, London, England.

Shell Oil Company states further that its nonwholly owned subsidiaries are: Saudi Petrochemical Company, CRI International, Inc., CRI Catalyst Company, CRI Europe S.A., CRI Fine Chemicals Inc., CRI Investment Corporation, CRI Asia Pacific Holdings Inc., CRI Asia Pacific Private Limited, CRI Catalyst Company Europe Limited, CRI Catalyst Company Belgium N.V., CRI Catalyst Company U.K. Limited, CRI Europe S.A., Catalyst Recovery Europe S.A., Catalyst Technology Europe S.A., Catalyst Technology GmbH, CRI Real Estate, Inc., CRI-SAM, Ltd., CRI Sales and Services Inc., CRI Zeolites Inc., Catalyst Recovery of Louisiana, Inc. Catalyst Technology, Inc., Catalyst Technology Services Inc., Catalyst Recovery Canada Ltd., CRI Metal Products, Inc., Shell Consolidated Energy Resources Inc., Shell Frontier Services Inc., Shell Land & Energy Company, Coral Energy Resources Services Company, Pecten Cameroon Company, Pecten Export Corporation Ltd., Pecten do Brasil Servicos de Petroleio, Ltda., Taranaki Offshore Petroleum Company Limited, Cortez Capital Corporation, Shell LSO Property Company, Premix/E.M.S. Inc., Butte Pipe Line Company, Dixie Pipeline Company, Explorer Pipeline Company, Locap, Inc., Plantation Pipe Line Company, West Shore Pipe Line Company, Wolverine Pipe Line Company, Coral Energy Resources, L.P., Coral Norstar L.L.C., Coral Power L.L.C., Coral Gas Marketing Company, Shell Oil & Gas Investment Limited Partnership, and Norstar Energy Limited Partnership.

IN THE

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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RESPONDENT SHELL OIL COMPANY'S MEMORANDUM IN OPPOSITION

Petitioners filed a Complaint against Shell Oil Company ("Shell") under the citizen suit provision of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6972 (1988 ed.). Petitioners sought to recover past costs for cleaning up soil contamination on their property.

The United States District Court for the Eastern District of Missouri held that it did not have subject matter jurisdiction over Petitioners' request for past cleanup costs. Furrer App. 28. The court reasoned that 42 U.S.C. § 6972(a)(1)(B) does not provide jurisdiction for suits

for " 'restitution' to recover costs associated with remediating petroleum contamination . . . ." *Id.* As an alternative ground for its holding, the District Court stated:

> [I]n order to prevail on their claim under RCRA, the plaintiffs must plead and prove that the leaking petroleum presents "an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a)(1)(B). Plaintiffs make no such allegation here. Further, as the plaintiffs have completely cured the contamination at issue in this case it will be impossible for them to prove that the petroleum contamination currently presents an imminent and substantial endangerment to the health or the environment.

Id.

The United States Court of Appeals for the Eighth Circuit affirmed the District Court's Judgment. Furrer App. 1. The Court held that "§ 6972 on its face does not provide for the recovery of remediation costs by way of a citizen suit." *Id.* at 5. The Court of Appeals did not reach the alternative ground of the District Court's holding under 42 U.S.C. § 6972(a)(1)(B) that Petitioners did not and could not allege a present "imminent and substantial endangerment to health or the environment." *Id.* at 5 n.6.

On March 19, 1996, this Court decided *Meghrig v. KFC Western, Inc.*, No. 95-83, 1996 U.S. LEXIS 1955. The Court held that "Section 6972(a) does not contemplate the award of past cleanup costs, and § 6972(a)(1)(B) permits a private party to bring suit only upon an allegation that the contaminated site presently poses an 'imminent and substantial endangerment to health or the environment,' and not upon an allegation that it posed such an endangerment at some time in the past." 1996 U.S. LEXIS 1955, at *16.

Based upon *Meghrig*, this Court should deny the Furrers' Petition. The Court's holding that the citizen suit

provision of RCRA does not permit one to recover past cleanup costs implicitly approves of the Eighth Circuit's identical holding in this case. Furthermore, the Court's holding that one must allege a present "imminent and substantial endangerment to health or the environment" to bring suit under § 6972(a)(1)(B) implicitly approves of the District Court's identical holding in this case and therefore constitutes an alternative ground to support the Eighth Circuit's opinion.

Meghrig ends the conflict between the Ninth and Eighth Circuits, establishes binding authority on the lower courts consistent with the Eighth Circuit's and District Court's opinions, and thus eliminates any basis for granting the Furrers' Petition. *See* Sup. Ct. R. 10.

CONCLUSION

For these reasons, this Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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